The Obviousness of Anarchy: Courts - The Art of Not Being Governed

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Continued from ***The Obviousness of Anarchy: Accessibility of Rules of Law***

Now that we have eliminated the legislature, what about the judiciary? Supporters of government claim that government is necessary to provide a system of courts for settling disputes. In the absence of the government provision of "a known and indifferent judge," [15] human beings would have no way to peacefully resolve interpersonal disputes. For "men being partial to themselves,"[16] adverse parties would inevitably seek to employ judges who would favor their interests; and judges, who would receive their fees from the litigants, would naturally favor those who could pay the most.

Hence, they would not be impartial. Because parties would be unable to agree on a neutral arbiter, they would be forced to resort to violence to resolve their disputes. Thus, without government courts, peaceful coexistence is impossible.

rules not rulers

I know this is getting boring, but the proper response to this is: look around. This is the age of globalization. Business is contracted around the world among parties from virtually all countries. Although there is neither a world government nor world court, businesses do not go to war with each other over contract disputes. News is almost always the news of violent conflict. The very lack of reporting on international business disputes is evidence that international commercial disputes are effectively resolved without the government provision of courts. How can this be?

The answer is simplicity itself. The parties to international transactions select, usually in advance, the dispute settlement mechanism they prefer from among the many options available to them. Few choose trial by combat. It is too expensive and unpredictable. Many elect to submit their disputes to the London Commercial Court, a British court known for the commercial expertise of its judges and its speedy resolution of cases that non-British parties may use for a fee. [17] Others subscribe to companies such as JAMS/Endispute or the American Arbitration Association that provide mediation and arbitration services. Most do whatever they can to avoid becoming enmeshed in the coils of the courts provided by the federal and state governments of the United States, which move at a glacial pace and provide relatively unpredictable results. The evidence suggests that international commercial law not only functions quite well without government courts, it functions better because of their absence.

But there is no need to focus on the international scene to observe that human beings do not need government courts to settle disputes peacefully. Labor contracts not only specify wage rates and working conditions; they create their own workplace judiciary, complete with due process guarantees and appellate procedures. Universities regularly provide their own judicial processes, as do homeowner associations. Stockbrokers agree to submit employment disputes to binding arbitration as a condition of employment. [18] Religious groups regularly settle disputes among congregants by appeal to priest or rabbi. Disfavored groups, for whom prejudice makes trial in government courts a mockery, readily devise alternative mechanisms for settling disputes without violence. [19] Insurance companies provide not only compensation for personal injury and property damage, but liability insurance, by which they assume the responsibility of resolving conflicts between their clients and those of other insurance companies according

to antecedently specified agreements that allow them to avoid the morass of the government judicial system. And empirical evidence demonstrates that when potential litigants in the government court system are directed into mediation, a significant portion of the lawsuits are resolved without trial. [20]

But don't just look around. Look back. Tax supported courts of general jurisdiction are an entirely modern phenomenon. Anglo-American law evolved in the context of a richly diverse set of competing jurisdictions. The royal courts, once they developed, existed in parallel with the antecedently extant hundred, shire, manorial, urban, ecclesiastical, and mercantile courts. [21] These court systems had fluid jurisdictional boundaries, and because the courts collected their fees from the litigants, they competed with each other for business. Indeed, the law of contracts and trusts, which evolved in the ecclesiastical courts, and commercial law, which evolved in the mercantile courts, entered the common law as a result of this competition. Further, the royal courts themselves consisted of four different and competing courts: king's bench, common pleas, exchequer, and chancery. These courts, like the others, collected their fees from the litigants, and hence, competed among themselves for clients. It was only with the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876 that the British government assembled its courts into its present monolithic, hierarchical structure, with American courts following suit at varying intervals thereafter.

Further, focusing on the competition among the common law courts misleadingly underestimates the diversity of the dispute settlement mechanisms that were actually employed. Because the cost of utilizing the common law courts was too great for the typical working man, those courts were virtually irrelevant to the majority of the population. Most citizens resolved their disputes according to informal, customary procedures that varied with the location (urban or rural) and class of those employing them. [22]

Since our present relatively non-violent, capitalistic society evolved in the context of a diverse and competitive system of courts and dispute settlement mechanisms, it cannot be the case that government provision of courts is necessary for peaceful settlement of disputes. In fact, a comparison of the amount of rancorous dissatisfaction produced by the contemporary government-supplied judiciary (consider the tort reform movement) with that associated with the more variegated traditional system of resolving disputes suggests that the government provision of courts reduces rather than augments social peace.

Continued in ***The Obviousness of Anarchy: Police***

Footnotes

[15] John Locke, Second Treatise of Government, edited by C.B. Macpherson (Indianapolis, Indiana: Hackett Pub. Co., 1980) (1690), p. 66.
[16] Id.
[17] See Mary Heaney, Where Business is King: London' Commercial Court Hears International Clashes, NAT'L L.J., June 5, 1995 , at C1; Campbell McLachlan, London Court Reigns as an International Forum: Parties in Cross-Border Disputes Welcome the Commercial Court's Expertise, Neutrality, and Speed, NAT'L L.J., June 5, 1995 at C4.↩
[18] Of course, this is mainly a measure designed to allow financial firms to escape from the quagmire of United States employment litigation.
[19] See Yaffa Eliach, Social Protest in the Synagogue: the Delaying of the Torah Reading, in THERE ONCE WAS A WORLD 84-86.
[20] See Joshua D. Rosenberg & H. Jay Folberg, Alternative Dispute Resolution: an Empirical Analysis, 46 STAN. L. REW. 1487 (1994).
[21] See HAROLD BERM AN, LAW AND REVOLUTION (1983).
[22] See E. P. THOM PSON, CUSTOM S IN COM M ON: STUDIES IN TRADITIO NAL POPULAR CULTURE (1993).

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